



Guidance in the Rulemaking Process
Committee on Administration and Management
Proposed Recommendation | June 5-6, 2014

Proposed Amendments

This document contains manager's amendments (with no marginal notes) and additional from Conference members (with the source shown in the margin).

1 Over the past two decades, the use of guidance—nonbinding statements of
2 interpretation, policy, and advice about implementation—by administrative agencies has
3 prompted significant interest from Congress, executive branch officials, agency officials, and
4 commentators. Most of this attention has been directed to “guidance documents,”
5 freestanding, nonbinding statements of policy and interpretation issued by agencies. While
6 such guidance is often helpful to the public and is normally to be encouraged, commentators
7 and the Administrative Conference have expressed concern that agencies too often rely on
8 guidance in ways that circumvent the notice-and-comment rulemaking process.¹ The long-
9 standing debate about guidance and its relationship to notice-and-comment rulemaking has,
10 however, largely overlooked consideration of the function and varieties of *contemporaneous*
11 *guidance*—that is, guidance that agencies provide about the meaning and purpose of their rules
12 ~~at the time they those rules are issued. them in the rulemaking process.~~²

¹ Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30101, 30103-04 (July 8, 1992).

² See KEVIN M. STACK, GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE at 2 (MAY 16/APRIL 1, 2014) (draft-Final Report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/sites/default/files/documents/Guidance%20in%20the%20Rulemaking%20Process%20Revised%20Draft%20Report%205%2016%2014%20ks%20final.pdf> ~~<http://www.acus.gov/sites/default/files/documents/Guidance%20in%20Agency%20Draft%20Report%204%2014.pdf>~~ [hereinafter Stack Report].

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13 Contemporaneous guidance appears in three main forms. First, agencies provide
14 guidance about the meaning and application of their rules in explanatory “statement[s] of their
15 basis and purpose,”³ statements that constitute the bulk of the ~~regulatory~~ “preambles” issued
16 with final rules. Second, agencies sometimes provide guidance in the regulatory text itself, in
17 the form of notes and examples, and more general guidance in appendices that appear in the
18 Code of Federal Regulations (CFR). Third, when agencies promulgate their regulations, they
19 sometimes also issue freestanding guidance documents. Contemporaneous guidance ~~has a~~
20 ~~fundamental fair notice benefit. It~~ furnishes the public and regulated entities with the agency’s
21 understanding of its regulations at the time of issuance, as opposed to later in time or in the
22 context of an enforcement proceeding, and can thereby reduce some of the ~~uncertainty and~~
23 ~~potential for abuse~~ incident to regulatory changes.

Comment [A1]: Morrison Amendment

Comment [A2]: Herz Amendment

24 The Administrative Conference commissioned a study of agencies’ current practices in
25 providing contemporaneous guidance and the law applicable to this form of guidance.⁴ This
26 Recommendation and the underlying report identify a set of best practices for agencies in
27 providing guidance in preambles to final rules,⁵ as well as some problems in agencies’ current
28 practices in providing contemporaneous guidance. The report also describes the law applicable
29 to guidance provided in preambles to final rules, regulatory text, and separate guidance
30 documents.⁶

Comment [A3]: Morrison Amendment

³ 5 U.S.C. § 553(c) (20~~12~~~~96~~).

⁴ See Stack Report, *supra* note 2.

⁵ The underlying study and this Recommendation address preambles to final rules, not preambles to other documents such as a notice of proposed rulemaking (NPRM). However, some of the recommendations herein may nonetheless have some application to preambles to NPRMs.

⁶ ~~Among other legal issues, the Stack Report addresses the application of the D.C. Circuit’s decision in *Alaska Professional Hunters Association v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) — that definitive guidance may be significantly revised only through a notice and comment rulemaking — to contemporaneous guidance. See Stack Report, *supra* note 2.~~



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31 This Recommendation builds upon two prior Conference recommendations with regard
32 to the use of guidance by agencies. Administrative Conference Recommendation 76-5,
33 *Interpretive Rules of General Applicability and Statements of General Policy*,⁷ identified the
34 benefits ~~both for an agency and potentially affected parties~~ of providing notice and an
35 opportunity to comment prior to the agency's adoption of guidance (sometimes called "non-
36 legislative" rules) for both an agency and potentially affected parties. In Recommendation 92-2,
37 *Agency Policy Statements*, the Conference advised agencies to impose binding standards or
38 obligations only through use of the legislative rulemaking procedures of the Administrative
39 Procedure Act (APA), typically the notice-and-comment process, and reiterated the importance
40 of allowing parties an opportunity to challenge the wisdom of the policy statement prior to its
41 application.⁸ The Office of Management and Budget's *Final Bulletin for Agency Good Guidance*
42 *Practices* (OMB's *Good Guidance Bulletin*),⁹ adopted in 2007, reflects the concerns identified in
43 these prior recommendations; the *Bulletin* obliges covered agencies to provide a means for
44 public feedback on significant guidance documents and to undertake notice-and-comment
45 procedures before issuing economically significant guidance, among other things. Neither of
46 the Conference's prior recommendations nor OMB's *Good Guidance Bulletin* specifically
47 addresses the guidance that agencies provide in preambles to final rules or in text that appears
48 in the CFR.

49 This Recommendation is aimed at addressing a number of issues regarding agencies'
50 current practices by isolating ways in which agencies' presentation and drafting of preambles
51 can be improved so that guidance contained therein is more helpful and more accessible. ~~to~~
52 ~~make it easier to identify the guidance agencies provide in these documents.~~ First, some

⁷ Administrative Conference of the United States, Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56767, 56769-70 (Dec. 30, 1976).

⁸ Recommendation 92-2, *supra* note 1, at 30103-04.

⁹ Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-01-25/pdf/E7-1066.pdf>.



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53 preambles do not include the issuing agency's statement of the purposes of the rules adopted
54 in light of the statute's objectives. That absence reduces the usefulness of these statements in
55 providing even the most basic guidance about the ~~effect-meaning and applicability~~ of the rules,
56 ~~and-it also ignores the APA's requirement that does not reflect the governing understanding of~~
57 ~~what is required by the APA's provision that~~ agencies accompany their final rules with a
58 statement of the rules' "basis and purpose." Second, the length of preambles to many major
59 rules makes locating preambular guidance difficult, particularly where a preamble is written as
60 narrative discussion without clear structure. Third, many agencies incorporate or rely upon
61 discussions of the basis and purpose of the rule provided in the notice of proposed rulemaking
62 or other prior notices in their preambles to final rules. This practice can save time and costs for
63 agencies in preparing preambles, but it also requires affected parties to integrate two or more
64 agency treatments of the rule's basis and purpose. Fourth, many agencies do not mention
65 preambles on their webpages and in other compilations of guidance, nor do they integrate the
66 guidance content of preambles into their indices or topical treatments of guidance. This does
67 not assist the public and regulated entities in integrating the guidance provided in preambles
68 with other guidance documents. Fifth, displaying electronic versions of regulations with
69 hyperlinks to relevant portions of their preambles and other guidance—a practice with which
70 some agencies are experimenting¹⁰—could make it easier to find this content, and holds
71 promise for future innovation.

72 A separate but equally important concern for preamble drafting is that some agencies
73 include statements in preambles to final rules that appear to create binding standards or
74 obligations as opposed to making those statements in the regulatory text. In this respect, this
75 Recommendation ~~makes-explicit~~highlights that the prohibition ~~on-against~~ agencies ~~stating~~
76 ~~standards~~presenting making statements in guidance documents in forms that appear to be

¹⁰ See, e.g., <http://www.consumerfinance.gov/eregulations/1005> (visited April 15, 2014) (providing a copy of 12 C.F.R. Part 1004 with hyperlinks to section-by-section analysis from regulatory preamble and other navigation tools and links).



77 | ~~binding applies to ,including or obligations in a form that appears to be binding in guidance~~
78 | ~~documents also applies to~~ statements in preambles.¹¹

79 | Many agencies have policies on issuing guidance documents, but these policies do not
80 | generally address preambles and other forms of ~~of~~ contemporaneous guidance. The Conference
81 | encourages agencies to include contemporaneous guidance within these policies as a step
82 | toward better integrating these forms of guidance with other guidance material. This
83 | Recommendation also highlights that for agencies covered by OMB's *Good Guidance Bulletin*,
84 | the guidance content of their preambles must comply with the *Bulletin's* requirements.

85 | Finally, the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)¹²
86 | requires that when agencies produce small business compliance guides, those guides be posted
87 | on the agency website in an "easily identified location."¹³ Despite this requirement, these
88 | guides are often difficult to find on agency webpages. The Recommendation highlights this
89 | statutory requirement and urges greater agency attention to it with the ~~guidance-assistance~~ of
90 | the Small Business Administration.

RECOMMENDATION

91 | Drafting of Preambles to Final Rules

92 | 1. In the statement of basis and purpose accompanying a final rule, agencies should
93 | address how the rule advances statutory objectives. ~~Such discussion should go in a way that~~
94 | ~~goes beyond merely parroting the statutory title or language text or title of the statute.~~

¹¹ See OMB's *Good Guidance Bulletin*, *supra* note 9, at 3440 (prohibiting mandatory language in guidance documents); *Recommendation 92-2*, *supra* note 1, at 30103-04 (advising against making binding statements in policy statements).

¹² See Pub. L. No. 104-121, 110 Stat. 873, codified at 5 U.S.C. § 601 ~~note~~, § 212 (2012) (requiring the production of compliance guides whenever the agency must produce a regulatory flexibility analysis under 5 U.S.C. § 605(b), and quoting § 605(b)).

¹³ *Id.* § 212(a)(2)(A).



95 2. For rules with lengthy preambles, agencies should consider including a section-by-
96 section analysis in which the organization of the preambular discussion corresponds to the
97 organization of the final rules themselves. Such Ssection-by-section analyses should go
98 beyond ~~without~~ merely parroting the regulatory text discussed.

99 3. When agencies incorporate or rely upon discussions of ~~the a~~ rule's basis and purpose
100 from prior notices, such as from the notice of proposed rulemaking, they should ~~do so be~~
101 mindful that such incorporation and reliance may make it more burdensome for readers to find
102 all relevant information.

103 4. ~~Agencies should not issue include statements of generally applicability in preambles~~
104 ~~that are intended to impose binding substantive standards or obligations upon affected persons~~
105 ~~in preambles.~~ Agencies should avoid use of mandatory language in the preambles to final rules,
106 unless an agency is using these words to describe a statutory, regulatory, or constitutional
107 requirements, or the language is addressed to agency staff and will not foreclose agency
108 consideration of positions advanced by affected ~~private~~ parties. Such language should be
109 understood to include not only mandatory terms such as "shall," "must," "required," and
110 "requirement," mentioned in the *OMB Final Bulletin for Agency Good Guidance Practices*
111 (*OMB's Good Guidance Bulletin*), but also any other language that ~~purports appears~~ to ~~specify~~
112 ~~establish the future legal effects of particular actions. impose substantive standards or~~
113 ~~obligations.~~

Comment [A4]: Council Amendment

Comment [A5]: Council Amendment

114 Policies on Guidance and Collections of Guidance

115 5. Agencies should mention preambles to their final rules as sources of guidance in their
116 general compilations of guidance and on their webpages devoted to guidance. Agencies should
117 also consider ways to integrate the guidance content of their preambles into their general
118 compilations of guidance and on their webpages devoted to guidance.

119 6. To the extent agencies have policies on issuing guidance, those policies should be
120 understood to address the guidance content of preambles to their final rules. For agencies



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121 covered by OMB's *Good Guidance Bulletin*, their policies should address compliance with the
122 ~~*Bulletin's procedural requirements applicable with respect to any significant and*~~ *to any*
123 ~~*significant guidance documents and*~~ economically significant guidance included in preambles to
124 final rules.

125 **Electronic Presentation of Regulations**

126 7. The Office of the Federal Register and the Government Printing Office are
127 encouraged to work with agencies to develop ways to display the Code of Federal Regulations
128 in electronic form in order to enhance its understanding and use by the public, such as ~~finding~~
129 ~~developing~~ reliable means of directing readers to relevant guidance in preambles to rules and
130 to other relevant guidance documents.

131 **Small Entity Compliance Guides**

132 8. Agencies should reassess how they are displaying the small entity compliance guides
133 on their websites to ensure that these guides are in an "easily identified location,"¹⁴ as
134 required by Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

135 9. The Small Business Administration should work with agencies to develop guidelines
136 for posting small entity compliance guides on agency websites in ways that make them easily
137 identifiable.

¹⁴ ~~5 U.S.C. § 601 note, § 212(a)(2)(A).~~